No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,

Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.

Respondents.

On Writ of Certiorari
to the U.S. Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF PROFESSOR EUGENE VOLOKH IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law, where he specializes in First Amendment law. He is one of the few academics who supports the Religious Freedom Restoration Act and its state analogs, while also believing *Employment Division v. Smith* was correctly decided. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465 (1999).

SUMMARY OF ARGUMENT

1. Justice Scalia was right: Courts should not be constantly "in the business of determining whether the 'severe impact' of various laws on religious practice" suffices to justify a constitutionally mandated exemption from a generally applicable law. *Employment Division* v. *Smith*, 494 U.S. 872, 889 n.5 (1990). "[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.*

Indeed, overruling *Smith* would revive all the flaws of a broad substantive due process regime: It would require courts to routinely second-guess legislative judgments about the normative foundations for a wide range of laws, and about the laws' practical necessity.

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or his employer (UCLA), contribute money for preparing or submitting this brief. The parties have consented to the filing of this brief.

For instance, should people have a right to assisted suicide? This Court in *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), refused to recognize such a right under substantive due process, and upheld an assisted suicide ban under the rational basis test. But if *Smith* were overruled, any person who claims a religious obligation to assist in suicide would trigger the very sort of strict scrutiny inquiry that *Glucksberg* forecloses.

Likewise, this Court has rejected heightened scrutiny of economic regulations, such as minimum wage laws. But if *Smith* were overruled, a person who claims a religious obligation to hire people but for less than minimum wage would be entitled to an exemption, unless the regulation passes strict scrutiny. And the list could go on.

Of course, it is appealing to protect religiously motivated action (or inaction) that does not really hurt anyone. But what constitutes "hurting anyone" is a hotly contested issue, as this very case shows. It is contested normatively. (Should refusing to deal with a same-sex couple qualify as hurting them? Is paying people a supposedly "exploitative" wage, even with their consent, hurting them?) And it is contested practically. (Would allowing assisted suicide end up pressuring people into choosing death even if they would rather not?) This Court's rejection of a general right to liberty under the rubric of substantive due process wisely recognizes that these questions should ultimately be left to the political process.

2. To be sure, normative and pragmatic judgments about which actions hurt others are familiar to courts. Much of the common law of tort, contract, and property reflects such judgments.

But such decisions are only tentative, because they can be overruled by legislatures. Judges have the first word on these matters, but not the last. That makes common-law decisionmaking legitimate even when aggressive use of substantive due process would not be.

Indeed, decisionmaking under RFRAs is in this respect similar to such common-law decisionmaking. Because RFRAs (state or federal) are mere statutes, they give judges authority to create exceptions but subject to possible revision by legislatures.

Thus, for instance, this Court concluded in *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal* that, in effect, *hoasca* was not so harmful as to justify denying an exemption request, 546 U.S. 418 (2006)—but if Congress had disagreed, it could have exempted the *hoasca* ban from RFRA, and thus had the last word on the subject. But if *Smith* were overruled, this Court's estimate of harm would have been final, unrevisable without an Article V constitutional amendment.

3. Some substantive constitutional rights, of course, do require courts to evaluate the normative and pragmatic justification for restrictions on those rights, and the test in those cases often is strict scrutiny. But *Smith* was correct in concluding that claims of those rights are quite different from claims of religious exemptions, 494 U.S. at 885-86. Those rights require second-guessing legislative judgments only for specific, well-defined zones of regulation (*e.g.*, content-based speech restrictions), where such judicial decisionmaking is especially justified. Overruling *Smith* would require courts to consider overriding legislative

decisions as to a vast range of generally applicable laws.

4. Nor should this Court limit *Smith* to laws that lack secular exceptions. A law can be generally applicable if it does not single out religious behavior for special burdens, even if it does include exceptions for certain kinds of secular behavior. Indeed, a vast range of important laws have many exceptions—trespass law, the duty to testify, antidiscrimination law, copyright law, contract law, and many others.

5. This brief takes no position on whether statements of government officials and the shifting legal basis for the government's actions may indicate that the City of Philadelphia singled out Catholic Social Services for different treatment on the basis of religion. Pet. Br. __. The brief argues only that this Court should reaffirm the *Smith* principle that, absent such intentional discrimination, the Free Exercise Clause does not provide a presumptive constitutional right to religious exemptions from government actions.[2]

ARGUMENT

I. *Smith* should be preserved, because the *Sherbert*/*Yoder* regime repeats the mistakes of substantive due process

From the late 1800s to now, litigants have urged courts to recognize broad protection for individual

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[2] This brief also does not discuss the original meaning of the Free Exercise Clause, a matter treated in Justice Scalia's and Justice O'Connor's opinions in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and likely in other forthcoming amicus briefs in this case.

liberty, often under the rubric of "substantive due process." People should have a constitutional right to do what they please, the theory goes, so long as they do not harm others. This Court, however, has largely rejected such claims, outside a narrow and controversial range of specific categories of behavior, mostly focused on family life and sexual autonomy.

And this rejection has been wise, because what constitutes "harming others" is so contested. Different people have different normative views about whether, say, discrimination harms others, or whether various employment practices harm even ostensibly consenting employees. They also have different pragmatic views about which behavior causes tangible harm, and whether such effects could be avoided in less restrictive ways. The only legitimate ways to finally resolve these controversies, this Court has concluded, is through the political process.

Take, for example, the asserted right to assisted suicide. In *Washington* v. *Glucksberg*, this Court concluded that the claimed right does not fall within the narrow "right of privacy," in which judicial judgment prevails over legislative judgment. 521 U.S. 702, 731-35 (1997). A state has the discretion to decide that "all persons' lives, from beginning to end, regardless of physical or mental condition," ought to be protected. *Id.* at 729. And a state may conclude, even without conclusive proof, that any legal allowance for assisted suicide would create the risk that some "disadvantaged persons might be pressured into physician-assisted suicide," *id.* at 731, so that assisted suicide would lead to the deaths of the reluctant and not just of those who genuinely seek death.

Nor did this Court have to itself decide whether these normative and practical judgments were sound: "We need not weigh exactingly the relative strengths of these various interests." *Id.* at 735. Rather, it concluded that the ban should be evaluated only under the rational basis test, leaving the key decisions to the legislature, not the judiciary. *Id.* at 728.

But say a doctor claims a Good Samaritan religious obligation to assist the suicide of someone whose life has lost what the doctor considers to be the proper dignity. Or say a patient claims a religious reason to end his life with a doctor's help.[3]

Under a revival of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), just as under the now-rejected expansive substantive due process doctrine, this Court would have to do what *Glucksberg* correctly concluded courts should not. It would have to decide whether, normatively, the state's interests in preserving human life extends to people who seek to die, and who are already suffering from a terminal illness. And it would have to decide whether, practically, the risk of people being pressured into assisted suicide can be avoided by various controversial less restrictive means (such as having doctors determine whether the patient's decision is truly voluntary, *see Glucksberg*, 521 U.S. at 785-86 (Souter, J., concurring in the judgment)).

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[3] *See, e.g.*, *Sanderson* v. *People*, 12 P.3d 851 (Colo. Ct. App. 2000); Brief of 36 Religious Organizations, Leaders, and Scholars as *Amicus Curiae* in Support of Respondents, *Vacco* v. *Quill*, 521 U.S. 739 (1997) (No. 95-1858); *Washington* v. *Glucksberg*, 521 U.S. 702 (1997) (No. 96-110).

Overruling *Smith* and returning to the *Sherbert*/*Yoder* approach would thus require this Court to make the same normative and pragmatic determinations it resolved to avoid in *Glucksberg*. To be sure, those determinations would only be made for those claimants who have a religious reason for their claims. But there could be many of those, especially once it becomes clear that a religious reason can turn defeat into victory. And in any event, the premise of *Glucksberg* is that this Court should not second-guess the normative and practical judgment of legislatures on such matters, whether for all claimants or only for some.

Overruling *Smith* would also shift such judgments from states to the federal government, and not just from the legislature to the judiciary. States may quite rightly reach different results on such normative and practical questions, as indeed they have since *Glucksberg* on assisted suicide. Indeed, preserving federalism was this Court's main concern in *City of Boerne v. Flores*, which invalidated the federal RFRA as applied to the states, and led many states to enact state RFRAs. 521 U.S. 507, 534 (1997). Returning to the *Sherbert*/*Yoder* era would be an even greater federal intrusion.

Or consider minimum wage laws. In *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), the Court held a minimum wage law unconstitutional because it violated the employer's liberty of contract. But in *West Coast Hotel Co. v Parrish*, 300 U.S. 379, 398 (1937), this Court reversed course on this, concluding that such decisions must be for legislatures not courts.

Yet reinstating the *Sherbert*/*Yoder* religious exemption regime would put courts back in the same

business. Say, for instance, that a religious employer claims that he has a religious obligation to try to hire the unemployed, but only at a wage that reflects the employee's actual value to the employer, which might be below the statutory minimum. (A claim of an employee's religious duty not to comply with minimum-wage law was in fact raised in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985). This Court disposed of the case by concluding that the particular claimants could obey the law without violating their particular religious beliefs, but such a result was made possible only by the specific nature of those claimants' beliefs.)

The employer's claim of exemption from minimum wage law would have to be judged under strict scrutiny, an even more demanding test than this Court applied in *Lochner*-era cases such as *Adkins*. Perhaps the law might pass strict scrutiny. *See Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1398-99 (4th Cir. 1990). Or perhaps not, especially now that this Court has read strict scrutiny as "exceptionally demanding," *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014), something it seemed not to do as to the Free Exercise Clause in the *Sherbert*/*Yoder* era.[4]

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[4] *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1247 (1994) (calling strict scrutiny during the *Sherbert*/*Yoder* era "strict in theory but feeble in fact"); Ira C. Lupu, *The Trouble with Accommodation*, 60 Geo. Wash. L. Rev. 743, 756 (1992) ("strict in theory, but ever-so-gentle in fact"); Michael W. McConnell*, Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1110, 1127 (1990) (saying that "[t]he 'compelling interest'

But in any event, a return to *Sherbert* and *Yoder* would require strict scrutiny of ordinary economic regulations, so long as someone objected to them on Free Exercise Clause grounds. And courts would then be obligated to reject *West Coast Hotel Co.*'s sound admonition that, "Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." 300 U.S. at 399.

Or consider prostitution. The majority in *Lawrence* v. *Texas* was careful to note that the facts of that case did not involve prostitution. 539 U.S. 558, 578 (2003). Lower courts have likewise read *Lawrence* that prostitution bans are subject only to rational basis scrutiny. *See, e.g.*, *People* v. *Conroy*, 811 N.E.2d 1197 (Ill. Ct. App. 2004).

Whatever the scope of a substantive due process right to sexual autonomy (or a privacy right, if that is how it is to be categorized), it does not extend to commercial sex. There is a good deal of reasonable debate about whether, on balance, prostitution bans are effective at serving various interests (such as preventing spread of serious sexually transmitted diseases or preventing coercion of prostitutes), or actually end up undermining those interests. But as with most other regulations of commercial activity, these questions are left for legislatures.

Say, though, that someone sincerely claims a religious calling to be a prostitute, perhaps to raise funds for a religious group to which the person belongs. (There is a long history of temple prostitution, and

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standard is a misnomer" in the *Sherbert*/*Yoder*-era cases because the actual test this Court had applied was more lenient).

some people might raise such claims, sincerely or at least plausibly sincerely. *See, e.g.*, Ankur Shingal, *The Devadasi System: Temple Prostitution in India*, 22 UCLA Women's L.J. 107 (2015); Leah Hyslop, *India's 'Prostitutes of God'*, Telegraph (UK), Sept. 20, 2010; Jennifer Hunter, *Sacred Prostitution, Contemporary*, *in* 2 Melissa Hope Ditmore, *Encyclopedia of Prostitution and Sex Work* 419 (2006).) Then the courts would have to step in and reconsider the legislative judgment about prostitution under strict scrutiny.

Such claims have indeed been brought. *See, e.g.*, *State* v. *Elise*, No. 1 CA-CR 16-0373, 2018 WL 5729354 (Ariz. Ct. App. Nov. 1); *Tracy* v. *Hahn*, No. 90-56223, 1991 WL 148926 (9th Cir. Aug. 6). Sometimes the courts may be able to conclude that the claims are insincere. *See Elise*, 2018 WL 5729354, *3; *Tracy*, 1991 WL 148926, *2. But in other cases, a defendant could be sincere, or at least there could be little evidence rebutting the defendant's claims of sincerity. The courts would then have to evaluate prostitution statutes under strict scrutiny after all.

And, finally, consider antidiscrimination statutes such as the one here. During the heyday of substantive due process in the early 1900s, this Court recognized a freedom of commercial association that could trump antidiscrimination statutes—for instance, ones that barred discriminating against union members. *See Adair* v. *United States*, 208 U.S. 161, 174-76 (1908) (striking down a law that banned employers from demanding that their employees not join a union, on the grounds that the government may not "compel any person in the course of his business and against his will to accept or retain the personal services of another"); *Coppage* v. *Kansas*, 236 U.S. 1, 12-13 (1915).

But since then, this Court has concluded that there is no such broad freedom of association, and only narrower rights limited to expressive association and to intimate association. *See, e.g.*, *Roberts* v. *United States Jaycees*, 468 U.S. 609, 617-20, 622-23 (1984).

Yet if *Smith* were reversed, courts would have to consider constitutional claims of exemptions from antidiscrimination law in employment, housing, public accommodations, and more. Those claims would not be limited to narrow claims about the right to choose clergy, the right to choose parade participants, or the right not to create expressive works—they would apply whenever someone has a religious reason for discriminating.

Consider, for example, the cases that have arisen involving discrimination against unmarried couples in housing.[5] Say a landlady believes it would be sinful for her to rent an apartment to an unmarried couple. If she raises a substantive due process challenge to a law banning marital-status discrimination in housing, she will lose (assuming she falls outside the narrow zone of constitutional protection provided by the right of intimate association[6]).

True, she might claim she is not violating anyone's rights by her decision, and libertarians may agree. No

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[5] *See, e.g.*, Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1525 n.191 (1999) (collecting seven such appellate cases, from various jurisdictions).

[6] Such a right likely applies to choice of roommates, *Fair Housing Council* v. *Roommate.com, LLC*, 666 F.3d 1216, 1220-22 (9th Cir. 2012), or perhaps the oft-discussed owner-occupied "Mrs. Murphy's boardinghouse," 114 Cong. Rec. 2495, 3345 (1968), but likely not to the typical non-owner-occupied rental.

one, they will argue, has a right to rent another's property over the owner's objections. But the legislature has taken a different view—it believes everyone has a right to be treated equally, even in opportunities to use another's property. And, under this Court's modern substantive due process doctrine, it is not for courts to decide whether the legislature's or the libertarians' normative vision is correct.

Yet here too, overruling *Smith* would require courts to decide whether there is a compelling government interest in prohibiting discrimination—which is to say decide whether to endorse the legislature's normative judgment that people have a right to be free of such discrimination. This is the very question that substantive due process jurisprudence suggests should be left to the legislature.

II. Accepting RFRAs is consistent with rejecting *Sherbert* and *Yoder*

Smith was thus right to reject the *Sherbert* religious accommodation regime. But its criticisms of that constitutional rule do not extend to RFRAs, because RFRAs involve a very different sort of "balanc[ing] against the importance of general laws the significance of religious practice," *Smith*, 494 U.S. at 889, n.5.

When judges apply the federal RFRA to a federal law, or a state RFRA to a state law, they are not saying, "Based on our own normative and pragmatic judgment, we conclude that the government cannot apply the law here." Rather, they are saying, "The legislature has asked us to carve out religious exemptions when we think government interests are not weighty enough or applying the law is not really necessary to

serve those interests—but if the legislature disagrees with our normative and pragmatic judgment here, it can simply exempt this sort of government action from the RFRA."

In this respect, the courts' normative and practical judgment under RFRAs is closely comparable to the judgment that courts have long exercised in developing the common law. Various common-law decisions of course involve normative and practical judgment—*e.g.*, whether to abrogate the tort of alienation of affections, whether to impose a duty on psychiatrists to report credible threats by their victims against third parties, whether to hold social hosts liable when they serve their guests alcohol and the guests later injure someone, or whether to limit the employment-at-will doctrine. Such judgment (albeit exercised cautiously, and constrained by precedent) is a traditional part of the role of common law courts.

Why is such judgment proper in common-law development, but resisted for substantive due process claims? Precisely because common-law development gives courts only the first say, not the last say. Legislatures can and do revise common-law rules when they disagree with the courts' normative and pragmatic judgments.[7] Likewise, if, for instance, Congress disagrees with this Court's judgment about the modest risks posed by *hoasca* in *O Centro*, it could simply "explicitly exclude[]" the *hoasca* ban from RFRA under 42 U.S.C. § 2000bb-3(b). Legislatures have indeed exempted various laws from RFRAs, such as drug laws,

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[7] *See, e.g.,* Cal. Civ. Code § 43.5 (abolishing tort claims for alienation of affections and similar torts); Cal. Civ. Code § 1714(b) (abrogating social host liability).

Fla. Stat. Ann. § 761.05(4); 71 Pa. Stat. § 2406(b)(1), and civil rights laws, Ind. Stats. § 13-9-0.7; Tex. Civ. Prac. & Remedies Code §§ 110.011. These provisions were aimed at anticipatorily precluding exemption claims; but a state could equally enact such a statute after a religious exemption is granted, if the legislature wants to prevent similar grants in the future.

The courts' role in creating religious exemptions under RFRAs is also comparable to their roles in creating other exemptions under other statutory grants of power. The congressionally enacted Federal Rules of Evidence, for instance, dictate that testimonial privileges are to "be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. Some environmental laws use the same language to authorize courts to develop affirmative defenses. *See, e.g.*, 42 U.S.C. §§ 6928(f)(4), 7413(c)(5)(D). The Copyright Act of 1976 authorizes courts to develop fair-use principles using their own discretion, though it provides more guidance than do the Rules of Evidence. 17 U.S.C. § 107. These are legitimate grants of discretion to courts, precisely because they leave legislatures generally free to substitute their own decisions about "reason and experience" for judges' decisions.

And RFRAs can help religious objectors even though grants of exemptions under RFRAs can be overruled by the legislature. First, RFRAs circumvent legislative inertia: It may take many years for objectors (especially those who belong to a small religious group) to get a request for a specific religious exemption on the legislative agenda. RFRAs let objectors bring their objections to court in the first instance—

and if a judge rules in their favor, legislative inertia will then cut in the objector's favor.

Second, legislatures that enact RFRAs limit local governments' and executive officials' ability to restrict religious practices. Indeed, in this very case, the Pennsylvania RFRA allowed CSS to raise an objection to the City of Philadelphia's actions, before either a federal court (as CSS did here) or a state court. To be sure, objectors will sometimes lose in court, as they did in this case, because the court will conclude that denying the exemption is justified under strict scrutiny. But at least they will have had the opportunity to challenge the local action in the first instance.

Third, legislative oversight may make judges more willing to grant religious exemptions. A court may be reluctant to accept a close constitutional claim precisely because accepting it would permanently bind the legislature. But under a RFRA, a judge may be more willing to decide close cases in the claimant's favor, precisely because the decision is not final.

The legislative authorization behind the RFRA model also makes exemptions easier to defend. Pro-exemption decisions under a *Sherbert*/*Yoder* regime say, implicitly or explicitly, "We refuse to apply a democratically enacted statute"; but under a RFRA, they can be written as "Pursuant to the legislature's command, we apply the democratically enacted state RFRA to carve out a religious exemption." The RFRA model thus provides a palatable option to judges (including elected state judges) who worry their decisions might lead to political backlash, or who are philosophically uneasy about the counter-majoritarian nature of judicial review.

RFRAs, then, are sound and valuable protections for religious objectors, in those jurisdictions where legislatures have chosen to enact them. But they are legitimate for the very reason that the *Sherbert*/*Yoder* regime was not: They leave the final word on contested normative and pragmatic questions with the legislature.

III. Strict scrutiny should be rejected for religious accommodation claims even though it is accepted as to narrower rights

Of course, courts do apply strict scrutiny to evaluate some substantive constitutional rights claims. *See, e.g.*, *Holder* v. *Humanitarian Law Project*, 561 U.S. 25-39 (2010) (content-based speech restrictions); *Maryland* v. *Craig*, 497 U.S. 836, 852-54 (1990) (restrictions on face-to-face confrontation); *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 802 (Ind. 2011) (restrictions on compulsory process rights). There, courts must indeed decide which interests are compelling enough, and whether a restriction is really necessary to serve that interest.

But these differ from claims of religious exemption in two major ways. First, they require judicial second-guessing of the legislature only in particular and relatively modest domains of government action. Relatively few government regulations, for instance, involve content-based speech restrictions (especially outside the familiar exceptions to First Amendment protection).

Religious exemption claims, on the other hand, could potentially be raised to "civic obligations of almost every conceivable kind," *Smith*, 494 U.S. at 888, such as "compulsory military service," "the payment of

taxes," "manslaughter and child neglect laws," "compulsory vaccination laws," "drug laws," traffic laws," "minimum wage laws," "child labor laws," "animal cruelty laws," "environmental laws," and antidiscrimination laws, *id.* at 889. Constitutionalizing religious exemption claims would involve courts potentially setting aside legislative judgments in a vast range of areas.

Second, free speech, the right to compulsory process, and other such rights are rights to do certain things *even when those things are harmful* in certain ways. The Compulsory Process Clause, for instance, secures a narrow right, but one that entitles the bearer to harm others by interfering in a particular way with their liberty and privacy. Certainly any private attempt to drag someone against his will into a room, make him talk on pain of imprisonment, and require him to turn over his property for inspection would normally be seen as a gross deprivation of liberty and property rights. Nonetheless, the Compulsory Process Clause authorizes such infliction of harm.

Likewise, free speech includes freedom to say things that might otherwise be seen as interfering with people's common-law rights—the rights not to be subjected to outrageously inflicted severe emotional distress, *Snyder* v. *Phelps*, 562 U.S. 443, 456 (2011); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 50-57 (1988), to interference with business relations, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 912-15 (1982), to anticompetitive conspiracies, *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight*, *Inc.*, 365 U.S. 127, 136-38 (1961), and more. It also includes the freedom to say things that advocate crime, and thus make crime more likely, outside the narrow incitement

exception, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969).

Free speech likewise involves the right to discriminate based on sexual orientation, sex, race, and the like, where the discrimination is part of one's freedom to associate for expressive purposes, or perhaps one's freedom not to be compelled to create expressive materials. *See, e.g., Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); *Masterpiece Cakeshop, Ltd.* v. *Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1741-46 (2018) (Thomas, J., concurring in part and concurring in the judgment); *Telescope Media Group* v. *Lucero*, 936 F.3d 740, 754-56 (8th Cir. 2019). This is so even when the law would otherwise treat such discrimination as a legally actionable dignitary harm.

And the Free Exercise Clause likewise includes a right to do things even when they are harmful to others in certain specific and narrow zones, such as "a religious group's right to shape its own faith and mission through its appointments" of ministers and others who would spread their faith. *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171, 188 (2012). The law generally recognizes discriminatory refusal to hire as a legally cognizable harm, because it interferes with people's ability to earn a living in their preferred profession. But churches are entitled to inflict that harm on prospective clergy and certain other employees.

In such situations, the premise of the right is that people are indeed entitled to inflict certain harms on others or on society, presumably because the exercise

of those rights is seen as so socially valuable, on balance, that those harms must be endured. And there, courts have to be able to determine when a harm is so grave or so otherwise unavoidable that certain restrictions on the right must be allowed—hence the strict scrutiny test.

But the Free Exercise Clause cannot be sensibly seen as generally authorizing people to inflict harms on others simply because they feel a religious obligation to do so. If Larry Flynt felt a religious obligation to protest with a bullhorn outside Jerry Falwell's house in the middle of the night, the Free Exercise Clause should not have given Flynt a religious exemption from the emotional distress tort (or from a noise ordinance). If people feel a religious obligation to interfere with someone's business relations by, say, blockading the entrance to the business, the Free Exercise Clause should not give them a right to do so. *Cf., e.g., American Life League, Inc.* v. *Reno*, 47 F.3d 642 (4th Cir. 1995) (rejecting a claimed religious freedom right to block the entrance to another's property). If people feel a religious obligation to interfere with the draft by blocking a draft office, the Free Exercise Clause should not give them a right to do so, even though the Free Speech Clause protects people's ability to interfere with the draft via anti-draft advocacy (at least outside the *Brandenburg* exception).

Likewise, though the Catholic Church has the right to hire only male priests, it does not follow that every employer that has a sincerely held religious belief that (say) he should not hire women with young children should have the same right. Though the Boy Scouts have the right to reject gay assistant scoutmasters, it does not follow that a restaurant that has a sincerely

held religious belief that it should not serve lunch to same-sex couples should have the same right.

This is so because, important as one's relationship with one's God may be to the believer, it cannot itself give the believer the constitutional right to harm a third party, even slightly. From the legal system's perspective, the believer's God is just the believer's own, not the third party's and not the legal system's. The Constitution does not give those acting in His name sovereignty over third parties' legally recognized rights and interests, or over the legally recognized interests of the public generally (as in the draft office hypothetical).

Constitutional protection for inflicting harm on others simply because of the nature of one's motivation (as opposed to other, more focused reasons) is virtually unprecedented. The only constitutional principle that even approaches such a regime is the expressive conduct doctrine. *See Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293-94 (1984); *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968).

But even this doctrine is very narrow. It applies only to "inherently expressive" conduct, *Rumsfeld* v. *FAIR*, 547 U.S. 47, 65-66 (2006), and content-neutral restrictions on expressive conduct are evaluated only under a fairly weak form of intermediate scrutiny, which has proven quite deferential to government interests, and not the strict scrutiny promised by the *Sherbert* era religious exemption cases. If expressive conduct is constitutionally allowed to inflict harm on others, these harms can at most be modest indeed; the prevention of even aesthetic harms, such as the "visual blight" created by billboards, has often been found

sufficient to justify restrictions. *See, e.g., Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984).

Now of course the typical arguments in favor of religious accommodations assert only a right to do things that *do not* harm others. Jefferson's defense of religious freedom, for instance, was justified by the argument that someone's "say[ing] there are twenty gods, or no God * * * neither picks my pocket nor breaks my leg."[8] Madison wrote that religion should be "immun[e] * * * from civil jurisdiction, in every case where it does not trespass on private rights or the public peace."[9] Similarly, Prof. Michael McConnell has argued that we should be "free to practice our religions so long as we do not injure others."[10]

But of course what constitutes harm to others is famously disputed. What kinds of emotional distress should qualify? When is discrimination in public accommodations a cognizable harm? Returning to the examples from Part I, is hiring someone for a sub-minimum wage a harm to that person, despite that person's ostensible consent? What about assisting the suicide of someone who very much wants such assistance—or perhaps someone who is being subtly pressured into seeking such assistance?

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[8] Thomas Jefferson, *Notes on the State of Virginia* 159 (William Peden ed., 1955).

[9] Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *The Writings of James Madison* 100 (Gaillard Hunt ed., 1901).

[10] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1128 (1990).

If the strict scrutiny test is to be used to determine what "really" harms others and what "doesn't really" harm them, then it will put courts in the very position described in Part I: They will have to constantly decide, as to laws "of almost every conceivable kind," *Smith*, 494 U.S. at 888, what should count as harm, and what in fact will cause that harm. And that indeed would be "horrible to contemplate," *id.* at 889 n.5.

IV. *Smith* should be applied even when a law contains secular exemptions

Some maintain that *Smith* should not apply, and thus that religious exemptions should be required, when laws contain exemptions for non-religiously motivated conduct. The Free Exercise Clause, the argument goes should at least provide a sort of "most favored nation"[11] status for religious practices—"when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

Petitioners in this case make a similar argument—that because Philadelphia permitted various categorical, secular exemptions but not religious ones, the law is neither neutral nor generally applicable and thus *Smith* should not control. Pet. Br. __. Instead, they say, scrutiny should be applied to determine whether a religious exemption is warranted, adding that this

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[11] *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 49-50.

Court's decision in *Lukumi* supports this conclusion. Pet. Br. __.

But *Lukumi* acknowledged that "[a]ll laws are selective to some extent," and condemned only legislative judgments "that the governmental interests it seeks to advance are worthy of being pursued *only* against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542 (emphasis added). "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens *only* on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543 (emphasis added). "[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued *only* against conduct with a religious motivation." *Id.* at 542-43 (emphasis added); *see also id.* at 524, 535, 543, 545, 546, 547 (likewise stressing that the ordinances in *Lukumi* were applied "only" to religious conduct, or "almost" "only" to such conduct, in a way that was evidence of deliberate targeting of religion).

And there is a good reason why this Court did not conclude in *Lukumi* that laws with secular exemptions were outside the scope of *Smith*: most laws have many secular exemptions, because they are animated by a mix of secular interests.

Consider something as simple as trespass law. It aims to protect people's right to exclusive use of their property—and yet it has exceptions that protect other interests: adverse possession, necessity, law enforcement, and so on. Thus, A may sometimes trespass on B's land to recapture A's straying animals who might

otherwise be injured,[12] or interfere with B's chattels to abate a nuisance.[13] But it does not follow that there is therefore a constitutional imperative to provide a similar exception for religious reasons for going on another's property (e.g., if one thinks there is a sacred site there) or damaging another's chattels (e.g., if one believes one must remove a blasphemous display).

The government may legitimately conclude that the law must balance some secular interests against other secular interests (whether those interests are compelling or merely legitimate), without creating an exception for people based simply on their religious beliefs. That your property rights must yield in narrow contexts to recognized secular concerns—concerns that society has decided merit exceptions from trespass law—does not mean that your property rights must yield to others' views of their own religious obligations.

Likewise, consider the duty to testify when subpoenaed, and the many testimonial privileges that constitute exceptions to the duty. *See, e.g.*, Cal. Evid. Code §§ 950-1063 (West 1995). These exceptions reflect value judgments in favor of protecting certain secular interests, such as the interests in protecting spousal confidences, trade secrets, doctor-patient communications, and the like (as well as the narrow religious interest in protecting clergy-penitent communications). These judgments stem from their own complicated mixes of normative decisions, practical estimations,

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[12] *See, e.g.*, Restatement (Second) of Torts § 197(1)(a).

[13] *See, e.g., id.* § 264(1).

and tradition. And the presence of those secular value judgments should not constitutionally obligate a state to provide a similar religious privilege to anyone who, for instance, feels a religious obligation not to testify against a parent or child[14] or against a coreligionist.[15]

Other laws likewise have vast arrays of exceptions. Breach of contract law has exceptions galore. The Copyright Act contains one operative section followed by over fifteen sections of exceptions. *See* 17 U.S.C. §§ 106, 107-122; *cf. Urantia Found.* v. *Maaherra*, 895 F. Supp. 1329 (D. Ariz. 1995) (rejecting a claimed religious freedom right to infringe another's copyright); *Bridge Publications, Inc.* v. *Vien*, 827 F. Supp. 629 (S.D. Cal. 1993) (same).

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[14] Some religious Jews take this view. *See, e.g.*, *In re Grand Jury Empaneling of Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999); *In re Doe*, 842 F.2d 244, 245-48 (10th Cir. 1988); *Port* v. *Heard*, 764 F.2d 423, 431-33 (5th Cir. 1985); *In re Greenberg,* 11 Fed. R. Evid. Serv. 579 (D. Conn. 1982); Erica Smith-Klocek, *A Halachic Perspective on the Parent-Child Privilege*, 39 Cath. L. 105 (1999). Such claims have generally been rejected, except in *In re Greenberg* and by the *In re Grand Jury Empaneling* dissent.

[15] Some Muslims and Jews take this view. *United States* v. *Thomas*, No. CRIM. A. 92-119-01, 1998 WL 633981, *1, *3 n.5 (Aug. 24, 1998); *State* v. *Bing*, 253 S.E.2d 101, 102 (S.C. 1979); *United States* v. *Huss*, 482 F.2d 38, 5 (2d Cir. 1973); *Smilow* v. *United States*, 465 F.2d 802, 804 (2d Cir. 1972), *vacated on other grounds*, 409 U.S. 944 (1972). Some people have raised still broader religious objections to testifying where their testimony could be used in ways that violate their religious beliefs, such as their religious opposition to capital punishment or their broader duty to avoid harm to others. *See People* v. *Ray*, 417 P.3d 939 (Colo. Ct. App. 2018); *People* v. *Woodruff*, 26 A.D.2d 236, 237-38 (1966).

Antidiscrimination statutes routinely have exceptions aimed at protecting many important secular interests, such as exceptions for businesses with fewer than some threshold number of employees. *See, e.g.*, 42 U.S.C. §§ 2000e(b), 2000e-1(b) (under 15); Wash. Stat. § 49.60.040(11) (under 8). Yet that the legislature views small employers' interest in freedom of association (or freedom from potentially burdensome employment regulation) as justifying limiting antidiscrimination law does not mean that it must similarly accommodate large employers' interests in complying with their religious beliefs.

And if the presence of the exceptions were seen as making the statute no longer "generally applicable" for *Employment Division* v. *Smith* purposes, that would require more than just the application of strict scrutiny to religious exemption requests: It would also mean that the laws would often be seen as failing strict scrutiny, precisely because of their underinclusiveness.

Under RLUIPA strict scrutiny, for instance, this Court held that a state prison system must allow short religious beards in part because of the presence of an exception for short medical beards: the exception, this Court stressed, made the policy "substantially underinclusive." *Holt* v. *Hobbs*, 574 U.S. 352, 367 (2015). In *Lukumi*, this Court similarly took the view that, once strict scrutiny is applied in a Free Exercise Clause case, a law's "underinclusive[ness]" shows that it is not "narrow[ly] tailor[ed]." 508 U.S. at 546. And one of the appellate cases that implements the petitioner's theory—*Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 211, 214 (3d Cir. 2004)—uses the presence of secular exceptions first to show that a facially religion-neutral law

had to be subjected to strict scrutiny, and then to show that it failed strict scrutiny because it was "not narrowly tailored."

Such an approach may be sensible under an RLUIPA or RFRA regime, since there the legislature could overrule decisions that it thought relied unduly on the presence of secular exceptions. But under the approach suggested by petitioners, granting religious exceptions based on the existence of secular exceptions would be a constitutional requirement. Faithfully applied, such a regime might well require broad religious exemptions from the duty to testify, from copyright law, from antidiscrimination law, from trespass law, and more.

And, just like returning to the *Sherbert*/*Yoder* approach would revive the main problems of the early 1900s substantive due process cases, so would an approach that requires comparing proposed religious exemptions with existing secular exceptions. In the early 1900s, the Court often concluded that the Equal Protection Clause required different practices to be treated the same way. One case, for instance, struck down statutes that awarded attorney fees to shippers in successful lawsuits against railroads, but did not likewise give fees to railroads when they prevailed.[16] Another struck down a tax that treated short

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[16] *See Atchison, Topeka, & Santa Fe Ry. Co.* v. *Vosburg*, 238 U.S. 56 (1915); *see also Gulf, Colo. & Santa Fe Ry. Co.* v. *Ellis*, 165 U.S. 150 (1897) (striking down a statute that allowed attorney fees against railroad company defendants but not against other defendants).

mortgages differently from long mortgages.[17] Another struck down a statute that barred injunctions in certain labor disputes but allowed injunctions in other cases.[18]

The problem, as the Court ultimately recognized in rejecting these holdings, is that whether two kinds of conduct should be treated alike calls for the same sort of normative and practical judgment about government interests (and rival private interests) that is called for by the decision about whether certain conduct should be restricted.[19] Different kinds of behavior differently affect the participants and third parties. To the 1915 Court, a prevailing shipper and a prevailing railroad may have seemed identically situated for purposes of an attorney fee award, but the legislature had come to a different conclusion. And, regrettably, the courts have no principled way of determining when the differences are great enough to justify different treatment.

When the law classifies people, institutions, or behavior based on religious denomination or even religiosity more generally, strict scrutiny makes sense. *See, e.g.*, *Lukumi*, 508 U.S. at 532; *Larson* v. *Valente*, 456

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[17] *See Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32 (1928).

[18] *See Truax* v. *Corrigan*, 257 U.S. 312, 334, 337 (1921). *But see id.* at 352 (Pitney, J., dissenting) ("Doubtless the legislature * * * concluded that in labor controversies there were reasons affecting the public interest for preventing resort to the process of injunction and leaving the parties to the ordinary legal remedies * * * .").

[19] See *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Railway Express Agency Inc.* v. *N.Y.*, 336 U.S. 106 (1949).

U.S. 228, 246 (1982); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024 (2017). But when the law restricts a wide range of behavior, entirely apart from its religiosity, there is no principled way to administer a constitutional exemption system, even when the law also exempts some behavior (again, for reasons entirely apart from religion).

CONCLUSION

"The world has never had a good definition of the word liberty," Lincoln said in 1864:

> We all declare for liberty; but in using the same word we do not mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompat[i]ble things, called by the same name—liberty.[20]

This, in a paragraph, is the tragedy facing libertarians, whether those committed to liberty broadly or to religious liberty specifically. Most people believe in liberty, and it is tempting for each to see the Constitution as a broad charter of liberty that prohibits tyrannical legislation. But each of us believes in a liberty—and its flip side, the body of private and societal rights and interests that none of us is properly at liberty to

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[20] 2 Abraham Lincoln, *Complete Works* 513 (John G. Nicolay & John Hay eds., 1907).

infringe—that may differ from the liberty envisioned by our neighbors.

Few of today's debates have the normative or political salience of the slavery controversy, but most do involve some incompatibility, similar in kind if not quite in degree, between competing conceptions of liberty: Consider, for instance, the liberty to use one's property as one sees fit versus the liberty to enter into same-sex relationships without discrimination by third parties, "two not only different but incompatible things, called by the same name—liberty."

The lesson of the early 1900s substantive due process experience is that—outside certain narrow areas—the final calls on what constitutes "liberty" and on when exercise of liberty unduly harms others must therefore be made through the political process. Liberty writ large may not be enforced by judges as a matter of constitutional command.

The Free Exercise Clause should therefore not protect claims of liberty of action, grounded solely in the religious motivation for one's actions, against the considered judgment of the democratic process. This Court got it right in *Smith*, and should use this case as an occasion to reaffirm that decision.

Respectfully submitted,

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